2011 WL 5288972 (Ga.) (Appellate Brief)
Supreme Court of Georgia.

STATE OF GEORGIA,
v.
Martin WHEELER, Appellant.

No. S11-A1838.
September 14, 2011.

Brief of Appellee State of Georgia

Joe Mulholland, District Attorney, State Bar Number 527912, P.O. Box 1870, Bainbridge, GA, 39818, (229) 221-4076.

***1** PRELIMINARY STATEMENT

The record on appeal in this case contains several transcripts. References to the original trial transcript shall be made by the letter "T", followed by a page number or numbers in parentheses. References to the transcript of the Motion for New Trial held on October 8, 2009 shall be made by the letters "MNT-1", followed by a page number or numbers in parentheses. References to the transcript of the Motion for New Trial held on November 18, 2010 shall be made by the letters "MNT-2" followed by a page number or numbers in parentheses. References to all other materials shall be made in the same way but shall spell out the item referred to (e.g., Brief of Appellant).

***2 I. PROCEDURAL HISTORY OF THE CASE AND STATEMENT OF THE FACTS**

Martin Wheeler was indicted by the Grand Jury of Grady County and was tried before a jury of his peers in September of 2007 for the cold blooded murder of Pearl Johnson. Because of his senseless acts of rage, an invalid woman was choked and stabbed to death. She left behind a daughter, son, and young grandchildren. T-255, 266. The small community of Cairo was shocked that somebody could hurt an **elderly**, handicapped woman in her own home.

On January 7th, 2007, Cairo Police Department Officer Dwight Patten responded to a welfare check call at the residence of Pearl Johnson. T-158. Some of the neighbors had not seen Mrs. Johnson for a couple of days and were concerned about her. (It was actually later learned that one particular neighbor had seen Mrs. Johnson the night before at 6:30 p.m., which allowed law enforcement to narrow down the time of death. T-253.) Mrs. Johnson was **elderly** and infirm, and was confined to a wheelchair. The front door was locked, so Officer Patten got the apartment manager to unlock it with a master key. The apartment was in no way ransacked or pilfered and appeared to be in order. T-160. Crime scene experts testified that there was no forced entry. All of the doors locked and secure. Every window was secured and locked and the window screens were undamaged. Mrs. Johnson's purse was located on the couch and appeared intact. T-181. The victim's son, Pyron Carter, testified that his mother never let any strangers in the house and always kept her door locked. T-274. Pearl Johnson's body was lying in the ***3** center of the living room. The scene was secured by officers of the Cairo Police Department and Georgia Bureau of Investigation. Crime Scene Specialists were called in to contain the scene and gather evidence. The specialists noticed with particularity a flimsy table in close proximity to the body of the victim. In their opinion, there were little signs of a struggle and all of the items on the table were intact. T-182. Further, the cleanliness of the house indicated that there was little to no signs of a struggle between the victim and perpetrator. CSI specialist Wes Horne also noted that it appeared from the blood smears on the body that somebody had touched her body with a bloody hand after blood was shed. T-184. Agent Horne also noticed that whoever had killed the victim had lifted her shirt up based on the puncture wounds to the chest and the lack of perforations in the sweater. T-185. A suspected bloodstain was found in the bathroom on the sink handle, and another bloodstain was discovered just behind the front

door handle. T-175. The house appeared to be cleaned and disinfected after the murder, as bleach and cleaning supplies were found in the bathroom and it appeared that the house had been sterilized. T-185, 200.

Agent Horne testified that in his expert opinion the bloodstain on the front door located behind the door handle was projected, not transferred. According to Agent Horne, the key difference is that transfer blood spatter is the result of a wipe or touch (and therefore could be either their own blood or someone else's blood whom they had touched), whereas a projected blood spatter would be a result of a person who had been cut 'projecting' their own blood onto an object. As such, agent Horne testified that in his expert opinion the bloodstain on the door would have been deposited by the donor ***4** themselves as they went to exit the residence, and not a secondary source. T-184, 197, 200.

Dr. Anthony Clark, a renowned pathologist, testified as to the cause of death. Dr. Clark obtained his Bachelor of Science from the Massachusetts Institute of Technology in 1980. He graduated from Jefferson Medical College in 1986, and completed his residency program in anatomic and clinical pathology at Hartford Hospital. Dr. Clark is board certified in anatomic and forensic pathology having conducted over 3800 forsensic examinations. He served as the first regional medical examiner in the State of Georgia at the Moultrie Lab and had been deemed an expert in the field of forensic pathology numerous times. T-127.

Dr. Clark examined the body of Pearl Johnson and conducted the autopsy. After examining all of the injuries to Mrs. Johnson, he opined that she was beaten (likely with a fist), strangled by the appellant (based on the peticeia in her eyes and bruising of the throat), and then stabbed multiple times in the neck and chest. T-138, 141, 144. The stab wounds were so deep that the handle of the knife came in contact with the body of the victim. The body of the victim was lying on the ground when it was stabbed multiple times. T-148. The length of the knife used would have been somewhere around three to four inches. Dr. Clark classified the murder as a 'rage killing'. T-149. The victim was assaulted in her face, likely with a fist, then strangled to the point of passing out. Finally, the perpetrator then stabbed the victim numerous times in the chest and neck area. This was a progression of injuries based on the person being in a highly outraged state. Finally Dr. Clark testified that it was his opinion that based on the emotional state of the perpetrator they likely knew the victim and were afraid of being discovered. T-156.

***5** Michael Gehring of the Georgia Bureau of Investigation Division of Forensic Science testified. Mr. Gehring attended Carnegie Mellon University and received a Bachelor's Degree in Biology. He then received his Master's Degree from Michigan State University in the specialized field of forensic biology. Mr. Gehring had conducted thousands of DNA tests in hundreds of investigations in his employment. He had previously been qualified and tendered as an expert in the field of forensic chemistry and DNA analysis. T-222.

Mr. Gehring testified that the blood found on the bathroom sink handle belonged to one donor- Pearl Johnson. T-238. Mr. Gehring then went on to testify that the blood sample found on the front door contained two donors- one primary donor and one secondary donor. The primary was positively identified as that of Martin Wheeler, with nine out of thirteen positive matches. According to the scientist, this means that the DNA substance had a one in thirty million chance of being anyone other than Martin Wheeler. The secondary donor had very few matches (only three matches out of thirteen) but was consistent with that of Pearl Johnson. The only people involved in the case that the co-mingled sample of blood matched were the appellant Martin Wheeler and the victim Pearl Johnson. T-241. Both the victim's DNA and the appellant's DNA were located in the one sample of blood on the front door behind the door handle. T-242.

The victim's son testified that prior to the murder of his mother the appellant had previously assaulted his mother. Pyron Carter testified that his mother called him after the appellant, who at the time was her boyfriend, had shoved her out of her wheelchair and beat her in the face. T-269. The victim's daughter, Princess Fields, also had witnessed the appellant assault the victim prior to the murder. Mrs. Fields testified that ***6** the appellant had previously choked the victim with a phone cord and beaten the victim so bad that she had bruises along her entire side of her body. T-369. Mrs. Fields also testified to finding a letter her mother had written prior to her death in which she stated that if she was ever found murdered that the appellant, Martin Wheeler, would be one of the persons law enforcement should target. T-380. Betty Reynolds, employed by the Georgia Bureau of Investigation, corroborated this information. Mrs. Reynolds is an expert in the field of handwriting analysis. Mrs. Reynolds

had been trained in comparing exemplars both by the Georgia Bureau of Investigation and the United States Secret Service. T-388. Mrs. Reynolds was able to confirm that Pearl Johnson did in fact write the letter in which she identifies Martin Wheeler as a person who likely was involved in her death by comparing the letter to her last will and testament. T-397.

Ina Bennett, a former girlfriend of the appellant, stated that he also used to get drunk and beat and choke her, the same cause of death in this case. Mrs. Bennett also testified that if she didn't have sex with the appellant he would hold a knife to her throat and threaten to kill her. T-421. Mrs. Bennett was also friends with the victim in this case. Mrs. Bennett testified that the victim would call her and tell her that she had been choked and beaten by the appellant twice in the past, and that he had cut another man with a pocketknife when he was in a jealous rage. T-423, 424.

Another ex-girlfriend, Nell Roth, told a very similar story. Mrs. Roth testified that Martin Wheeler assaulted her when he was drunk and jealous while traveling back from Florida. Mrs. Roth testified that the appellant busted her lip open and gave her a black eye when she refused his sexual advances. T-428. After that incident, Mrs. Roth didn't want to be alone with the appellant.

***7** Betty Manning attended a dance with the appellant in Pelham, Georgia. After the dance, the appellant attempted to have sex with Mrs. Manning and when she refused he got mad. Mrs. Manning stated that he beat her in the face and choked her with his hands, and had she not yelled out and received help from a neighbor she might herself have been killed. T-433, 438. Additionally, Mrs. Manning testified that Mr. Wheeler had previously threatened to kill the victim in this case during a dispute between the two. T-434.

The appellant's former wife, Alice Wheeler, told a similar account of **abuse** over the course of their twenty year marriage. Mrs. Wheeler described how the appellant was literally a different person when he began to drink. She told in detail how Mr. Wheeler would get drunk and choke her and beat on her. She tearfully related how she lived in fear for her life along with her two daughters lives. T-444. Mrs. Wheeler explained how the appellant was impervious to the law since he was related to the Sheriff. She finally left the appellant after he choked her to the point of death, and as she aptly described “I am going to be dead living in it, or I will be dead getting out of it.” T-447. Because of the appellant's drunken rages, Mrs. Wheeler was forced to get security lighting, a pit bulldog, and roommates in order to feel some measure of safety. T-447.

After a three day trial, he was convicted of malice murder, felony murder, and aggravated assault. The trial court found that counts two and three merged for purposes of sentencing with count one and sentenced the appellant to life in the state penitentiary for count one. T-563.

Trial Counsel, Billy Grantham, filed a Motion for New Trial on behalf of the appellant on September 26th, 2007. A Supplemental Motion for New Trial was filed by Gee Edwards, who was appointed appellate counsel, on September 1st, 2009. A second ***8** Supplemental Motion for New Trial was filed on behalf of the appellant on September 30th, 2009. A hearing based on the briefs and arguments of appellate counsel was held on October 8th 2009. Appellate counsel then filed a Third Supplemental Motion for New Trial on June 2, 2010. On November 18th, 2010, another hearing was held in which both sides concluded all evidence and arguments in support thereof. The main crux of appellant's argument seemed to be that trial counsel should have attempted to procure independent DNA testing.

Appellate counsel was appointed and twice attempted to find an expert to refute the scientific evidence of the State. After being unsuccessful in their first attempt to procure an expert, appellant was finally able to find an expert to counter the State's testimony. However, the expert would only go so far as to challenge the phraseology of the State's witness, and not the actual science itself. Appellate counsel proferred the testimony of Nancy Peterson. Mrs. Peterson testified that in her opinion the bloodstain found on the door exiting the apartment where the victim was killed was more likely a “blood” DNA sample mixed with a “touch” DNA sample. MNT-2-14, 24. Mrs. Peterson conceded that even under her theory of blood and touch DNA making up the evidence, it was indisputable that there were two profiles of DNA that were co-mingled. MNT-2-20. Mrs. Peterson also conceded that at least one of the DNA donors was bleeding, and that the primary donor was by far most likely the

appellant. MNT-2-21. Mrs. Peterson admitted that based on the evidence then, both the appellant and the victim were bleeding in the house. MNT-2-23.

Mrs. Peterson found that the quality control and procedures used by the GBI in this case were in accordance with Federal standards. MNT-2-11,34. In fact, Mrs. ***9** Peterson also did not dispute the findings of the Georgia Bureau of Investigation Crime Lab analysts Micheal Ghering and Brad Pearson in this case, stating that they both "accurately portrayed the evidence and what were the meanings of the evidence during trial." MNT-2-12. Her argument was therefore not with the expert testimony of the State's witnesses but rather with the GBI agents characterization of the DNA samples as "co-mingled".

Mrs. Peterson attempted to claim that the GBI agent improperly testified to the DNA sample by calling it "co-mingled" versus "mixed". The trial court found the distinction to be irrelevant. Mrs. Peterson could not explain how any difference between the wording would have had an outcome at trial when specifically asked about by the trial court "That's not DNA expert testimony, is it?" Mrs. Peterson had no response. MNT-2-27. Mrs. Peterson admitted on cross-examination that the GBI agent wasn't giving an expert opinion on the science of DNA. Mrs. Peterson conceded that the GBI agent was merely inquiring as to why the appellant's DNA would be present in the victim's house during his interview with the appellant (Q:...his point of asking those questions was to find out why or why not Mr. Wheeler's DNA and blood would be in the house, correct? A: I guess so.)MNT-2-30.

After analyzing the evidence and opinions of the crime lab experts, the second DNA "expert" corroborated the findings of the crime lab but disagreed with the wording used by the GBI investigator when interrogating the appellant about the DNA evidence. At the time of trial, this second "expert" Mrs. Peterson, was present in Kosovo would not have even been available to testify. MNT-2-18.

***10** Chief Judge A. Wallace Cato denied appellant's Motion for New Trial on May 13, 2011. Record-225-252. This appeal follows.

II. ALLEGED ENUMERATIONS OF ERROR

1. A reversal is warranted because Mr. Wheeler was not afforded effective representation at trial and the Trial Court erred in denying his motion for new trial on that ground. Specifically, trial counsel's performance was ineffective because he failed to obtain an independent D.N.A. analysis to challenge the State's conclusions, failed to cross-examine the State's witnesses about the question of whether the D.N.A. mixture was from two samples, he operated under a conflict of interest because a witness was a former client, and he failed to make certain objections at trial.

2. A reversal is needed because the Trial Court erred in concluding that prior bad acts between Mr. Wheeler and third persons were admissible.

3. A reversal is warranted because the Trial Court erroneously denied Mr. Wheeler's motion to recuse two jurors for cause.

4. A reversal is warranted because the convictions are based on insufficient evidence.

5. A reversal is warranted because the handwriting analyst was improperly allowed to introduce documents that she did not personally seal and that she opened prior to testifying.

***11** 6. A reversal is warranted because new evidence has been discovered that demonstrates Mr. Wheeler's innocence as the State's co-mingled blood theory is not scientifically valid.

7. Mr. Wheeler is entitled to a reversal because his due process right to present evidence of his innocence would be violated if he were not afforded a trial where he was allowed to demonstrate that the D.N.A. sample found at the door was not produced by a result of his bleeding and the victim's bleeding at the same time.

***12 III. ARGUMENT AND CITATION OF AUTHORITY**

I. ***Alleged Enumeration of Error 1: A new trial is warranted because Mr. Wheeler did not receive effective representation at trial.***

Trial Counsel was effective in its representation of the appellant within the guidelines afforded by Georgia law.

A trial court's finding that an appellant has been afforded effective assistance of counsel must be upheld unless that finding is clearly erroneous. *Garrett v. State,* 196 Ga. App. 872, 874 (1990). In order to prevail appellant must satisfy both prongs of *Strickland v. Washington,* 466 U.S. 668 (104 S. Ct. 2052, 80 L. Ed. 2d 674) (1984); that counsel's performance was deficient and that the deficient performance was prejudicial to his defense. To meet the first prong of the test, appellant must overcome the "strong presumption" that counsel's performance fell within a "wide range of reasonable professional conduct". *Smith v. Francis,* 253 Ga. 782, 783 (325 S.E. 2d 362) (1985). The reasonableness of counsel's conduct is examined from counsel's perspective at the time of trial and under the circumstances of the case. *Smith,* 253 Ga. at 784. The second prong requires that he show that there is a reasonable probability that, absent counsel's unprofessional errors, the result of the trial would have been different. *Smith,* 253 Ga. at 783; *Ingram v. State,* 262 Ga. App. 304, 309 (5) (585 S.E.2d 211) (2003). There must be ***13** clear and convincing evidence that trial counsel was ineffective as a matter of law. *Flanningan v. State,* 269 Ga. 160 (1998). Here, the appellant has not shown any evidence that his trial counsel's performance was defective. Nor has appellant shown that any alleged deficiency would have, with a reasonable probability, affected the outcome of the trial. Mr. Wheeler was represented by an attorney with thirty years of experience primarily in criminal defense. Mr. Grantham has served as the chief assistant public defender since the inception of the public defender system, and has tried hundreds of cases. T-18.

Appellate counsel has alleged several specific enumerations of error which the Court will address individually.
Allegation A. Trial Counsel should have requested and obtained an independent DNA analysis to challenge the State's findings.

Appellate counsel has failed to show both that trial counsel was ineffective in not seeking independent analysis of the DNA in this case nor that any analysis would have had a reasonable probability of changing the outcome.

Appellant counsel alleges that by obtaining an independent analysis of the DNA evidence in this case the outcome would have been different. This argument is without merit. Appellate counsel originally attempted to secure the testimony of a DNA expert that would be contradictory to that of the experts who testified at trial. On October 8, 2009, appellate counsel proffered John **Elder** as an expert in the field of DNA analysis. T-23. On voir dire of his qualifications, Mr. **Elder** conceded that his expertise was in the study of genetics involving fish and had done no analysis involving human beings. T-25. Mr. **Elder** was asked whether he was qualified to analyze human DNA, and he testified ***14** that he was not. T-27. As such, the trial court refused to admit the witness as an expert in the field of DNA analysis. T-29.

Appellate counsel then sought out another expert in the field of DNA analysis. Roughly one year later, appellate counsel secured the services of Nancy Whitney Peterson. MNT-2-5. Mrs. Peterson testified that in her opinion the evidence found on the interior of the front door was not "co-mingled" blood but rather a blood sample from appellant that had intermingled with a previous DNA sample deposited earlier by the victim. MNT-2-20. In her opinion, the blood sample was deposited by appellant and the "touch" DNA sample was deposited by the victim. MNT-2-22. Mrs. Peterson did not dispute that the proper quality control measures were used in this case. MNT-2-11. Mrs. Peterson testified that the laboratory analysts Brad Pearson and Micheal Gehring, accurately portrayed the evidence and the meanings of the DNA evidence at trial. MNT-2-12. Her only contention

was that the DNA sample should not have been referred to with the language “co-mingled blood” but rather should have been referred to as a “mixed DNA sample”. MNT-2-28.

Trial counsel was not deficient in securing an independent analysis of the DNA evidence before trial. Trial counsel testified as to why he chose to downplay the DNA evidence at trial. Trial counsel explained that the theory of the case was centered on the fact that someone else had admitted to killing the victim while using drugs. T-18. Trial counsel testified that he felt that it was best to deflect as little attention as possible on the appellant's DNA found in the house. T-13. Based on the scientific evidence, the blood found on the interior front door was appellants but there was a strong argument that the other sample was so small that there was a question as to who it belonged to. Trial ***15** counsel felt that the defense had a plausible explanation for the blood found on the door since appellant was **elderly** and bled easily. T-7. Strategic choices will not be examined in terms of outcome but rather whether they were reasonable. Smith v. State, 283 Ga. 237 (2008). Here, it was perfectly reasonable for trail counsel to downplay the scientific evidence as to appellant's DNA being found at the scene of the crime. Rather, trial counsel chose to employ a more reasonable strategy of concentrating on the other suspects that law enforcement had and facts and circumstances that indicated their guilt rather than concentrating on the scientific evidence that pointed to the guilt of his client. In light of this reasonable strategic choice, there was sufficient explanation as to why trial counsel would not have sought independent evidence of the DNA in this case.

Further, appellate counsel has failed to show that an independent analysis of the DNA evidence in this case would have changed the outcome at trial. It took appellate counsel over a year to find a qualified witness who would refute the findings of the DNA expert at trial. Appellate counsel's first “expert” was not qualified to render an opinion in reference to human DNA due to his lack of training and experience in the field. MNT-128, 29. Had appellant called this witness at trial, his testimony would have only enhanced the stature and testimony of the State's witnesses who were in fact deemed to be experts in the field of DNA analysis. T-204, 220-223. After another year of searching, appellant was finally able to find an expert who that would at least offer a different interpretation of the State's language (although the expert would not dispute the quality controls or findings by the State's experts, as argued above). This “expert” was not even in the country at the time of the trial, as she was in Kosovo and testified she didn't know if she would have been available or not based on that fact. MNT-2-18. Instead, ***16** appellant's witness testified that if she had been called as a witness, she would have “found somebody else” to testify in this case. MNT-2-18. Mrs. Peterson's assertion that she would “find somebody” to challenge the testimony of the state's experts is not enough (it also shows her misplaced partiality). Appellant must show that there was testimony available at the time of trial that would contradict the State's experts. Even assuming that appellant was able to find some unknown third person to testify as Mrs. Peterson would have, appellant has failed to show anything more than a distinction without a difference. Mrs. Peterson was forced to admit on cross-examination that the analysts used all proper protocol and reached scientifically correct results. Her only contention was with the language the analysts used, i.e. “commingled blood” versus “commingled DNA”. She was forced, though, to admit that his blood was present on the interior front door. MNT-2-22. She also had to admit that the victim's blood was found in the sink of the bathroom of the scene of the crime. MNT-2-23. Whether the second sample found at the interior front door that was consistent with the victim's type was “blood DNA” versus “touch DNA” is irrelevant given that both appellant's and the victim's blood were both found in the house at the same time in other locations.

Mrs. Peterson conceded on questioning that the appellant's blood was clearly present in the household along with the victim's blood. Her testimony at best would still have established the appellant's blood on the door handle exiting the apartment of the murder coupled with DNA from the victim. At worst, she had to concede that the State was correct in that the DNA sample contained the blood DNA of both the victim and the appellant. Regardless, the important factor of evidence was that the appellant's DNA was present in a blood sample found on the door exiting the murder scene. Whichever ***17** testimony the jury concluded was correct would have been a distinction without a difference, and there is no reasonable probability that the outcome would have somehow been altered by this innocuous difference in testimony. See *Miller v. Miller*, 285 Ga. 285 (2009). Here, the appellant has not shown any evidence that his trial counsel's performance was defective. Nor has appellant shown that any alleged deficiency would have with a reasonable probability affected the outcome of the trial.

Allegation B: *Trial Counsel was ineffective because he operated under a conflict of interest.*

Trial counsel did not have a conflict of interest and was not ineffective because he previously represented a witness who testified in this case.

Trial counsel Billy Grantham previously represented a witness in this case, Eddie Elmas. Eddie Elmas was at one point a suspect in the crime and had been incarcerated on drug charges during the pendency of the trial. T-333. Trial counsel testified that because he had previously represented Mr. Elmas on a criminal charge, he had "a better grasp on the situation because I remember that they (law enforcement) strongly suspected Eddie as the perpetrator of the crime." MNT-8. The question of whether an attorney labors under an actual conflict of interest for purposes of the Sixth Amendment generally arises when the purported conflict stems from the attorney's representation of multiple defendants concurrently. *Lanier v. State*, 2010 Fulton County D. Rep. 3502 (2010). Here, trial counsel's representation has not been shown to have adversely affected the outcome of the trial. Trial counsel was not representing co-defendants. Further, trial counsel ***18** testified that his previous experience with the witness in this case actually assisted his representation of the appellant. MNT-9.

The appellate courts have also found a Sixth Amendment actual conflict to occur when the attorney's duty of loyalty to his client conflicts with the attorney's duty to the attorney's employer. *White v. State*, 287 Ga. 713 (2010). This was not the case here. Trial counsel was asked "But you didn't feel that you operated under any sense of divided loyalty to the two?" to which he responded unequivocally "Oh, no. No question about that." MNT-9. Appellant has cited *U.S. v. Havania*, 989 F.Supp. 1187 (1997) for the supposition that when an attorney represents both the defendant and a witness for the state who will testify against the defendant there is an actual conflict and a potential conflict if it is not clear that the witness will testify. That case has no bearing on the circumstances at hand because trial counsel had represented the witness in a prior case in which the witness was prosecuted but he was in no way representing the witness at the time of appellant's trial. MNT-1-9. Appellant also cites the case of *Summerlin v. Johnson*, 157 Ga. App. 704 (1981). In *Summerlin*, the Court of Appeals held that when an attorney has represented a party in a prior matter and the matter bears a substantial relation to the matter at hand there is an irrebuttable presumption that confidential matters were disclosed. 157 Ga. App. 704 (1981). Again, the murder case at hand had nothing to do with the prior charge in which trial counsel represented witness Eddie Elmas as the previous representation of the witness had been closed and there has been absolutely no showing that the two cases were in any manner interrelated. In fact, trial counsel testified that because of his previous representation of the witness in the case he was able to better represent appellant because he had 'inside information' about the witness. MNT-1-9. ***19** Appellant has failed to show any error through trial counsel's previous representation of a witness.

Allegation C: Trial Counsel was ineffective for failing to object and move for a mistrial during closing arguments.

Trial counsel was not ineffective for failing to object to the prosecutor's remarks concerning the appellant.

Appellant argues that trial counsel was ineffective in failing to object to the prosecutor's remark that appellant was "one of the meanest SOBS in Grady county". T-531. When asked about why he didn't object to this remark, trial counsel testified that he felt he had opened the door in his closing remarks to such a comment. Trial counsel testified at the motion for new trial that "I think I had opened the door to that because in my argument, I had suggested to the Jury that is was all right if they believed that Mr. Wheeler was the meanest SOB in Grady County, that didn't make him guilty of this crime." MNT-1-10. Trial counsel stated he was making the alliteration to counter the testimony of the five similar transactions that had been admitted by the State. Trial counsel testified that he was attempting to say that even if appellant had committed the prior similar transactions, to which counsel objected to, it didn't necessarily mean he was guilty of the crime charged. MNT-1-10. Not objecting to innocuous statements by the prosecutor was a reasonable trial strategy given the context of the arguments.

"Counsel enjoys very wide latitude in closing arguments, and may make use of well-known historical facts and illustrations, so long as he does not make extrinsic or prejudicial statements that have no basis in the evidence.... Counse's illustrations during closing argument may be as various as are the resources of his genius; his argumentation ***20** as full and profound as his

learning can make it; and he may, if he will, give play to his wit, or wing to his imagination." *James v. State,* 265 Ga. App. 689 (2004). Here, the prosecutor's comments were reasonable and permissible based on the evidence and trial counsel was not ineffective for failing to object to the comments.

Allegation D: Trial counsel was ineffective for failing to request a necessary jury charge.

Trial counsel was not ineffective in not requesting a jury charge on mere presence as it was in conflict with the trial strategy that counsel had developed.

Appellate counsel argues that trial counsel should have requested a jury instruction on mere presence. However, trial counsel testified at the Motion for New Trial that he felt that main defense at trial was that Mr. Wheeler was not present when the crime was committed. As such, any charge relating to the appellant being present when the crime occurred would not only be counterproductive but also damaging to the trial strategy. MNT-11. Decisions of counsel made in furtherance of reasonable trial strategy do not constitute deficient performance. *Upton v. Parks,* 284 Ga. 254 (2008). Trial counsel's failure to request a jury charge on mere presence was well within the parameters of reasonable trial strategy.

E. Allegation E: Trial Counsel was ineffective for failing to make objections.

Trial counsel was not ineffective for failing to object as delineated by appellate counsel. Further, appellate counsel has failed to establish that the objections alleged would have produced a different outcome.

Appellant alleges that Georgia Bureau of Investigation special agent Rich improperly testified as to opinion testimony. Appellant argues that Bahan Rich, an ***21** officer with the Georgia Bureau of Investigation involved with law enforcement for ten years, was improperly allowed to testify as to his observations as the crime scene and as to the evidence collected by the GBI. Counsel's arguments are without merit and misplaced. A witness may describe as concretely as possible what they observed. Hicks v. State, 256 Ga. 715 (1987). Here, the supervising officer testified as to what he saw at the crime scene and the basis for his opinion.

Investigator Rich testified that he observed blood in the sink of the bathroom. He further testified that the cause of death was clearly sharp force trauma and the body was found in the living room. Given the proximity of the bathroom where the blood was found and the fact that there was no other signs of blood other than on the body in the living room, the witness testimony was clearly based on the observations at the murder scene Investigator Rich was more than qualified to testify that in his opinion the scene had been "cleaned up". T-289.

In *Coleman v. State,* 257 Ga. 313 (1987), the appellate courts discussed when a witness could testify to what they observed. In *Coleman,* supra, the Court held:

> "In the instant case it was permissible for the [officer] to testify about his observations of the physical evidence at the [victim's] residence. It was likewise allowable for [the officer] to assist the jury by stating his opinion, that, based on his experience and training in the field of criminal investigation and crime scene reconstruction, the physical evidence was consistent with a hypothetical sequence of events surrounding the shooting."

Coleman, supra.

Appellant also takes issue with Georgia Bureau of Investigation Officer Bahan Rich's testimony that there was "co-mingled" blood found at the scene. Appellate ***22** counsel's own witness admitted that there was a "co-mingled" DNA sample found at the scene. She also admitted that the DNA was found in a blood sample. MNT-2-30. As such, any argument as to whether the agent could have been more specific in his choice of words would be semantics. What he was describing was in fact a co-

mingled sample of blood. Any further testimony by the officer distinguishing blood DNA or touch DNA would have been in the form of expert testimony, which is exactly what appellate counsel now attempts to limit. MNT-2-29. Counsel cannot have it both ways. The limited testimony offered by the officer was in relation to why he was questioning the appellant as to his DNA being present at the scene of the crime and why the appellant was a suspect. His testimony was in no way related to that of an expert in the field of DNA nor did the investigator address the ultimate issue in this case that the jury ultimately decided-the appellant's guilt. MNT-2-28. Further, trial counsel testified at the motion for new trial that he would not have objected to this testimony because he felt that the argument about co-mingled substances was not readily clear to the jury and he wanted to concentrate his argument as to the other suspects. MNT-1-13. Attempting to limit the testimony of the damning DNA evidence by concentrating the defense on other avenues was not only reasonable but prudent. As such, there was no error in failing to object.

Appellant also argues that Investigator Rich should not have been allowed to testify that there was no blood on the knife due to the fact that the suspected knife was seized a considerable time period after the murder. Again, trial counsel stated that his strategy was to limit the time spent discussing the DNA evidence and attempt to flesh out details about the other suspects. MNT-13. Here, there was another suspect that had allegedly given a partial confession to being present at the crime scene the same day the ***23** victim was killed. MNT-2-37. Also, another person of interest had been found with a knife with suspected blood on it in the area of the crime scene, yet the blood had not been able to have been positively identified. MNT-2-37,38. Had counsel given significant time cross-examining degradation issues with appellant's knife would have adversely affected his ability to argue as to why there was no positive analysis on witness' Elmas knife Given the difficult nature in attacking the validity of DNA evidence and the reasonable explanation that the suspected knife had already been shown not to have any blood on it whatsoever, it was entirely reasonable for trial counsel not to object to the testimony of the officer on the subject of the knife and downplay its significance.

Assuming arguendo that trial counsel should have objected to these alleged improper comments, appellant has failed to show how any one or all of the objections would have changed the outcome of the trial. As trial counsel stated, “Mr. Edwards, I try not to object to every possible objection there can be. I try to save objections for the things that are really hurting us. And I don't see where any of these really would have made a difference with the jury.” MNT-15. None of the alleged objections by themselves nor any combination thereof would have changed the outcome. Given the multiple similar transactions against the appellant, the previous acts of violence against the victim, the irrefutable DNA evidence of appellant linking him to the type of killing involved, the suspected weapon found at his residence, his lack of an explanation as to why his bodily fluids were found at the scene, and the access appellant had to the victim prior to her death were too much of a hurdle for any questionable objection to overcome. Appellant has failed to establish either prong of *Strickland,* supra, and as such, this argument is without merit.

24 II.** ***Allegation: A New Trial is warranted because Similar Transactions by Mr. Wheeler were improperly introduced at trial.

The Similar Transactions were properly admitted based on the prior allegations and pending charges.

Appellant alleges that the previous acts of domestic violence should not have been admitted in the appellee's case in chief. Prior to the trial of the appellant, the State filed a Motion to Admit Similar Transactions under Uniform Superior Court Rule 31.3. The State filed its motion within the ten day requirement of USCR 31.3. Motion for Similar Transaction-4.

Before evidence of independent crimes is admissible, the State must make three affirmative showings: (1) that the State seeks to introduce such evidence, not to raise an improper inference as to the accused's character, but for some appropriate purpose which has been deemed to be an exception to the general rule of inadmissibility; and (2) that there is sufficient evidence to establish that the accused was in fact the perpetrator of the independent crime; and (3) that there is a sufficient connection or similarity between the independent offense and the crime charged so that proof of the former tends to prove the latter. Once these prerequisites have been established, testimony concerning the independent crime may be admitted for the purpose of showing intent, identity, motive, plan, scheme, bent of mind, and course of conduct. *Gilham v. State,* 232 Ga. App. 237,237-238 (1998); *Williams v. State,* 261 Ga. 640, 642 (1991); *Hall v. State,* 186 Ga. App. 830 (2) (1988).

In determining whether or not the State has presented sufficient evidence to establish that the accused was in fact the perpetrator of the independent crime, the ***25** standard of proof of reasonable doubt is not applicable. The State is only required to present "sufficient evidence." *Williams v. State,* 251 Ga. 749, 784 (1984) (the Atlanta child murders case); *Smith v. State,* 267 Ga. 363, 364 (1996). Here, the State showed sufficient evidence of the previous allegations against the appellant and the crimes charged. Four women testified to their previous relationship with the appellant and the domestic **abuse** that he inflicted upon them. These included the appellant's ex-wife. MST-24. All four of the women were **abused** by the appellant in a similar manner All of the victims testified that he would drink alcohol, get jealous and attack them. All of the women testified that he threatened to kill them. All of the victims testified that he would beat them about the face and choke them. Several of the women testified that he carried a knife and threatened to stab them if they did not submit to his desires. MST-12. In the case at bar, the appellant was charged with murdering his long time girlfriend Pearl Johnson by beating her in the face, choking her and then cutting her throat. MST-8. Based on the unique and similar manner in which the appellant continually beat and choked his girlfriends over the course of the last several decades and the nature of the crime charged, the Court admitted the prior similar transactions. The Court also noted that the incidents were not limited to one isolated incident but had occurred several times over the course of the last three decades repeatedly. The mere lapse of time between the earlier transaction and the offense charged, therefore, does not render the evidence automatically inadmissible. Instead, lapse of time is a factor to be considered when balancing the probative value of the evidence against its potentially prejudicial effect. *Gilham v. State,* 232 Ga. App. 237, 239 (1998); *Perkins v. State,* 224 Ga. App. 63 (3) (1996); *Carter v. State,* 205 Ga. App. 885, 887 (1992). Independent crimes occurring up ***26** to twenty years prior to the offense on trial have been held admissible. *Perkins v. State,* 224 Ga. App. 63 (3) (1996); *Childs v. State,* 177 Ga. App. 257 (1) (1985); *Gibbins v. State,* 229 Ga. App. 896 (4) (1997). *See also Oller v. State,* 187 Ga. App. 818 (1988).

Here, the appellant had assaulted the alleged victim several times over the course of their relationship for the previous ten years just as he had assaulted all of his previous girlfriends. MST-9. Pyron Carter, the victim's son, testified to the violence appellant inflicted on his invalid mother in the late 1990's; sometime around 1996-1999. T-269. Ina Bennett's testimony related to the time she was dating appellant, from 1976 to 1996, in which she was repeatedly beaten by appellant. T-420. Nell Sue Roth went out with appellant in the early 70's, and was attacked by appellant. T-426. Betty Manning went out with appellant in the 80's, and she was also attacked by appellant. T-433. Alice Wheeler was previously married to appellant, and suffered multiple attacks at the hands of appellant during their marriage. Finally, after twenty years of domestic **abuse**, Alice left her husband in fear for her life and the life of her children. T-447. While any of these incidents by themselves would not be relevant to the crime charged, they show a repeated pattern of violence with the person appellant is involved with. Regardless of who he was involved with, every woman associated with appellant over the course of the last thirty years has been assaulted. There was never a break in time from appellant's **abuse** of his wife, Alice Wheeler, to the victim in this case, Pearl Johnson, just merely a change in victims. As such, the trial court properly admitted the prior systematic **abuse** of women by appellant.

Here, the crimes charged of malice murder by choking and blunt force trauma were identical to the injuries the alleged similar transaction victims. There is no ***27** requirement that the other transaction must be identical in every respect to the charged crime. *Perkins v. State,* 224 Ga. App. 63 (3) (1996); *Carter v. State,* 205 Ga. App. 885, 886 (1992). The correct focus, therefore, is upon the nature of the similarities, if any, between the extrinsic evidence and the crime charged, rather than incorrectly focusing upon any differences that may exist. *Clark v. State,* 226 Ga. App. 176 (2) (1997). Here, the crimes charged and the previous injuries were sufficiently similar so that their admission was warranted.

III. Allegation: A New Trial is Warranted because the Court Erred in Denying Mr. Wheeler's Motion to Strike Two Jurors for Cause.

The Court did not err in refusing to strike jurors 59 and 76 for cause.

Appellate counsel alleges that this Court erred in refusing to strike venire panel jurors 59 and 76. The trial court is given the utmost discretion in weighing the bias of jurors and will not be reversed absent a manifest **abuse** of discretion. *Grasham v. Southern Railway,* 111 Ga. App. 158 (1965). The judge is the only person in a courtroom whose primary concern, indeed

primary duty, is to ensure the selection of a fair and impartial jury. *Ivey v. State*, 258 Ga. App. 587 (2002). Here, the potential juror stated that while her husband had worked at the police department, she had not talked to him about the particular crime in this case. T-23. The venire juror also stated she was not friends with the victim in this case but merely acquaintances. T-24. Juror Pearson also testified under oath that any friendship or relationship she had with law enforcement would not influence her in the least. T-51. Mrs. Pearson also did not raise her hand when asked if there was any reason at all as to why she could not be fair and impartial. T-40. Venire juror Barbara Carroll was also asked several times as to whether she could be fair and impartial. Repeatedly, ***28** she stated that she thought she could. T-21, 31. Appellate counsel has not shown any relationship which would require statutory disqualification of either juror and both said they could be fair and impartial. Neither of the juror's opinions were so fixed and definite that they would have been unable to set the opinion aside and decide the case based upon the evidence and the trial court's instructions. This argument is without merit.

IV. ***Allegation: A New Trial is Warranted because Mr. Wheeler's Conviction is based upon insufficient evidence.***

There was sufficient evidence for which a jury was entitled to use to justify the conviction of the appellant.

The standard of review is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781 (1979). An appellate court does not weigh the evidence or determine witness credibility but only whether the evidence is sufficient under *Jackson v. Virginia. Willingham v. State*, 242 Ga. App. 472 (2000). Here, there was sufficient evidence of the appellant's guilt upon which a jury could reasonably find him guilty. There was ample evidence of the appellant's past history of violence with the particular victim along with his propensity for violence with previous girlfriends. His DNA was found in a bloodstain on the doorway leading out of her apartment, which he could not account for. T-237, 298. The manner of death, described as a 'rage killing', and lack of forced entry led to the reasonable assumption that the victim knew her assailant. T-149, 183.The type of weapon used in the killing was consistent with a pocketknife found in the appellant's possession which he was know to carry around. T-444. As such, a jury had more than enough evidence to convict the appellant.

29 V.** ***Allegation: A New Trial is warranted because a letter was improperly introduced as being authorized by the victim without any authentication.

The Chain of Custody was Sufficiently Established by the State in Relation to the Letter Allegedly Written by the Victim.

The State introduced a letter written by the victim in this case in which she states her concerns that appellant was going to kill her. The letter was authenticated by a handwriting analyst with the Georgia Bureau of Investigation. The Georgia Bureau of Investigation Analyst testified that when she received the documents in question they were sealed in plastic envelopes. T-390. The analyst also stated that the letters were in her possession until her examination of the materials, and that nothing was added or deleted to the questioned items. T-390, 391. The State was able to establish the proper chain of custody for their examination. Princess Fields, the victim's daughter, testified that she retrieved State's exhibit 45 (a letter allegedly from the victim) from the personal belongings of her mother. She then turned the letter over to GBI agent Bahan Rich. T-368. Virginia Green, a friend of the victim, testified that she received an alleged will and testament from the victim several years before her death and turned the will over to GBI agent Bahan Rich. T-364. Agent Rich testified that he submitted both state's exhibit 45 and 46 in sealed envelopes for comparison to the state crime lab in Atlanta. T-379. Agent Rich did not alter or delete the writing samples before their submission. T-380. The State showed with reasonable certainty that the evidence is the same as that seized and that there has been no tampering or substitution. Further, unlike the items in the cases cited by appellant, the handwriting sample in this case was not a fungible item. Compare to Wilson v. State, 271 Ga. App 359 (2005) and ***30** *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011) to *Green v. State*, 287 Ga. App. 247 (2007) and *Kuykendall v. State*, 299 Ga. App. 360 (2009). As such, this argument is without merit.

VI. ***Allegation: Material evidence of innocence has been found and a New Trial is warranted.***

There has been absolutely no showing of new evidence whatsoever. As such, this argument is without merit.

Appellant argues that O.C.G.A § 5-5-23 provides that a new trial is warranted where new evidence is discovered after a verdict of guilt is rendered. Appellant misinterprets the code. O.C.G.A.§ 5-5-23 specifically states "A new trial may be granted in any case where any material evidence, not merely cumulative or impeaching in its character but relating to new and material facts, is discovered by the applicant after the rendition of a verdict against him and is brought to the notice of the court within the time allowed by law for entertaining a motion for a new trial. O.C.G.A.§ 5-5-23.

Furthermore, when a new trial is sought on the grounds of newly discovered evidence, as in the case at bar, it appears that all of the essential elements of an extraordinary motion for new trial based on newly discovered evidence must be shown. *Coalley v. State,* 146 Ga. App. 526, 246 S.E.2d 512 (1978). This Court has held that:

> "The rules relating to the grant of a new trial based on newly discovered evidence are: (1) that the evidence has come to the knowledge of the moving party since the trial; (2) that it was not owing to the want of due diligence that the moving party did not acquire it sooner; (3) that it was so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness."

Coalley v. State, 146 Ga. App. 526 (citing *Walters v. State,* 128 Ga. App. 232 (2), 233 (196 SE2d 326) (1973). All six requirements must be complied with to secure a new trial. ***31** *Timberlake v. State,* 246 Ga. 488; 271 S.E.2d 792 (1980). Failure to establish one of the six requirements is grounds for denial of the motion for new trial. *Offutt v. State,* 238 Ga. 454, 455; 233 S.E.2d 191(1977). This Court has held that a trial court's denial of a motion for new trial will not be reversed unless it "affirmatively appears that the court **abused** its' discretion." *Young v. State,* 269 Ga. 490 at 491-492 (Ga. 1998).

This Court has established a very high standard for what is considered newly discovered evidence. In *Hester v. State,* the defendant appealed the denial of his motion for new trial that was founded on new testimony from a woman who proffered that Vickers, a friend of the defendant, had admitted to killing the victim. 282 Ga. 239 (2007). In affirming the denial of the motion, this Court held that the newly discovered evidence would have not reasonably produced a different verdict. *Id.*

In the case at bar appellant has established far less than the appellant in *Hester v. State. Id.* As previously stated on Page 16 of this brief Mrs. Peterson only proffered testimony of a distinction without a difference. During the second hearing on the Motion for New Trial, Mrs. Peterson stated that while she disagreed with the testimony of Agent Rich, specifically the wording he used during his testimony, she took no stance against the procedures used by the DNA analysts at the crime lab. MNT-2-12-13. In fact, Mrs. Peterson testified that Brad Pearson and Michael Gehring "accurately portrayed the evidence and what were the meanings of evidence during trial." MNT-2-12. Through the testimony of Mrs. Peterson appellant counsel then sought to elicit testimony amounting to a legal opinion on the qualifications of Agent Rich that Mrs. Peterson was not qualified to render. MNT-2-12-13.

***32** Much like the facts of *Hester v. State,* the appellant has failed to produce any new evidence that would warrant a new trial under *Coalley v. State.* 146 Ga. App. 526. Here, the appellant bases the crux of his argument not on the expert opinion of Mrs. Peterson but on a legal opinion that she was not qualified to render. At best, Mrs. Peterson's testimony would be characterized as impeaching in nature (although the State vehemently denies this position and would characterize her testimony as irrelevant and cumulative). Therefore, appellant has failed to establish a minimum of two of the six elements required for a new trial to be granted on appeal under this Court's holding in Coalley v. State. Id; Timberlake v. State, 246 Ga. 488. While there was new testimony from Mrs. Peterson in the second hearing on Motion for New Trial, there was no new evidence. Appellant has not shown that Mrs. Peterson's unqualified legal opinion as to Agent Rich's word choice and qualifications would have reasonably

produced a different verdict. *See Hester v. State*, at 242. As such, neither O.C.G.A. § 5-5-23 nor the rulings of this Court apply to the facts and circumstances here and appellant's argument is without merit.

VII. Allegation: Mr. Wheeler's Due Process Rights were violated and a New Trial is warranted.

Appellant's due process rights were upheld. His only problem is with the verdict contrary to his wishes.

A jury of the appellant's peers held that there was evidence beyond a reasonable doubt that he committed the murder of Pearl Johnson. While this Court will review the ***33** record and grant a new trial if one is warranted, similarly if a new trial is not justified it is this Court's duty to deny the motion for new trial.

As Justice Grice stated in 1939:

> "The aim of the law is justice. It gives to the trial judge a weapon which it expects him to use in proper cases, -- the power to grant a new trial in order to accomplish the high purpose of the law. The discretion to grant a new trial is entrusted to him and to him alone. This great power given to him by the law is not an arbitrary discretion, of course, but a judicial discretion, placed in the hands of one whom the law regards as not only skilled in her service, but who has an eye single to the great object for which courts are established - to administer justice according to law. When it appears to his judicial conscience that a verdict is contrary to the evidence or without evidence to support it, he should grant a new trial; or if he thinks there is evidence to support the verdict and his judicial conscience approves it as the truth of the case, and if no error of law is involved, he should refuse a new trial, leaving it to this court in either event only to review his judgment, on whether he has erred, that is, **abused** his discretion, in granting or refusing a new trial, as the case may be."

Mills v. State, 188 Ga. 616 (1939).

After reviewing the record in this case, this Court cannot find any legitimate reason for which to overturn that verdict. His contention that there is "new evidence" is not based in reality nor is it backed by the scientific evidence present in this case.

CONCLUSION

For the reasons set forth above, Appellee prays this Court to affirm the conviction of Martin Wheeler so that this matter can finally be resolved for the victim's family.

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